92-1325

Supreme Court, U.S.
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Case No. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1992, TERM

CAROL ELIZABETH ZAWROTNY,
as personal representative of
the Estate of Carrol Clint
Ballard, Deceased,

Petitioner,

v.

PAULA RAYE BREWER,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED FOR REVIEW

Is this Court's holding in *Ridgway v. Ridgway*, 454 U.S. 46, 102 S.Ct. 49, 70 L.Ed.2d 29 (1981), limited to the issue presented therein, or does it in fact pre-empt state law (15 O.S. § 178)?

May lower courts analogize ERISA and FEGLIA cases to SGLIA cases in situations requiring a determination of whether the federal act preempts state law, even though ERISA and FEGLIA have explicit language mandating preemption while SGLIA does not?

B. LIST OF PARTIES

The names of all parties to this proceeding appear in the caption of this case.

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E. LOWER-COURT OPINIONS

This case was filed as Case No. CIV-91-407-C in the Western District of Oklahoma. The district court opinion was rendered October 31, 1991. That opinion is not reported.

The Tenth Circuit opinion was rendered on November 5, 1992, in appeal No. 91-6383. It is reported as *Brewer v. Zawrotny*, 978 F.2d 1204 (10th Cir. 1992).

F. STATEMENT OF JURISDICTION

This case was originally filed in the federal district court for the Western District of Oklahoma. The district court had federal-question jurisdiction under 28 U.S.C. § 1331 and Article VI, Clause 2 of the United State Constitution to determine the effect of the Servicemen's Group Life Insurance Act (now renumbered as 38 U.S.C. §§ 1965-1979; formerly 38 U.S.C. §§ 765-

779) (hereinafter referred to as "SGLIA")[1] upon entitlement to life insurance proceeds.

On October 31, 1991, the district court entered (a) a Memorandum Opinion and Order granting the plaintiff's motion for summary judgment and (b) judgment in favor of the plaintiff. The defendant timely filed her Notice of Appeal in the district court on November 12, 1991. Therefore, the United State Court of Appeals for the Tenth Circuit had jurisdiction to hear the appeal from the district court under Fed.R.App.P. 4(a)(1) and 28 U.S.C. § 1291.

On November 5, 1992, the Tenth Circuit rendered its decision affirming the district court. With this Petition for

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[1]This act is sometimes incorrectly referred to as the National Service Life Insurance Act, which is the predecessor to the SIGLIA.

Writ of Certiorari being filed within 90 days of the Tenth Circuit's opinion (*i.e.*, on or before February 3, 1993), this Court has jurisdiction under Supreme Court Rule 13.1 and 28 U.S.C. § 2101(c).

G. STATUTES INVOLVED IN THE CASE

38 U.S.C. § 1970(a)
(formerly 38 U.S.C. § 770(a))

(a) Any amount of insurance under this subchapter in force on any member or former member on the date of the insured's death shall be paid, upon the establishment of a valid claim therefor, to the person or persons surviving at the date of the insured's death, in the following order of precedence:

> First, to the beneficiary or beneficiaries as the member or former member may have designated by a writing received prior to death (1) in the uniformed services if insured under Servicemen's Group Life Insurance, or (2) in the administrative office established under section 766(b) of this title if separated or released from service, or if assigned to the Retired Reserve, and insured under Servicemen's Group Life Insurance, or if insured under Veterans' Group Life Insurance;

Second, if there be no such beneficiary, to the widow or widower of such member or former member;

Third, if none of the above, to the child or children of such member or former member and descendants of deceased children by representation;

Fourth, if none of the above, to the parents of such member or former member or the survivor of them;

Fifth, if none of the above, to the duly appointed executor or administrator of the estate of such member or former member;

Sixth, if none of the above, to other next of kin of such member or former member entitled under the laws of domicile of such member or former member at the time of the insured's death.

15 O.S. § 178 A, B & D

A. If, after entering into a written contract in which provision is made for the payment of any death benefit (including life insurance contracts, annuities, retirement arrangements and other contracts designating a beneficiary of any right, property or money in the form of a death benefit), the party to the contract with the power to designate the beneficiary of any death benefit dies after the divorce from the beneficiary named to

receive such death benefit in the contract, all provisions in such contract in favor of the decedent's former spouse are thereby revoked. Annulment of the marriage shall have the same effect as a divorce. In the event of either divorce or annulment, the decedent's former spouse shall be treated for all purposes under the contract as having predeceased the decedent.

B. Subsection A of this section shall not apply:

1. If the decree of divorce or annulment is vacated;

2. If the decedent had remarried said former spouse and was married to said spouse at the time of the decedent's death;

3. If the decree of divorce or annulment contains a provision expressing an intention contrary to subsection A of this section;

4. If the decedent makes the contract subsequent to the divorce or annulment;

5. To the extent, if any, the contact contains a provision expressing an intention contrary to subsection A of this section; or

6. If the decedent renames said former spouse as the beneficiary, in a writing, delivered to the payor of the benefit, prior to the death of

the decedent and subsequent to the divorce or annulment.

D. This section shall apply to any contract of a decedent made and entered into on or after November 1, 1987.

H. CONCISE STATEMENT OF THE CASE

II. Statement of Facts.

The following are uncontroverted facts which were presented to the district court. Most were incorporated into the district court's Memorandum Opinion and Order, reproduced in the Appendix of this Petition.

1. **March 31, 1979:** Effective this date, the life of Carrol C. Ballard ("Ballard") was insured by a policy issued by the Prudential Insurance Company of America ("Prudential"). (*See* Uncontroverted Fact No. 1, Memorandum Opinion and Order).

2. **September 29, 1990:** Brewer and Carrol C. Ballard were married. (*See* Uncontroverted Fact No. 3, Memorandum Opinion and Order).

3. **October 12, 1990:** Change-of-beneficiary form was completed by Carrol C. Ballard. This form removed his 5 children as primary

beneficiaries and designated Brewer, for the first time, as the primary beneficiary, and "my estate" as the secondary beneficiary. This form was received by Prudential on October 19, 1990.

4. **October 19, 1990:** Brewer filed for divorce from Carrol C. Ballard just ***twenty days*** after they were married.

5. **November 7, 1990:** Carrol C. Ballard's Affidavit, Entry of Appearance and Waiver was filed, and a divorce decree was entered.

6. **November 23, 1990:** Carrol C. Ballard died (*see* Uncontroverted Fact No. 8, Memorandum Opinion) just ***sixteen days*** after the divorce was granted.

Both Brewer and Zawrotny made claims upon Prudential for payment of the proceeds of Prudential's policy, and, as is set forth above, summary judgment was granted in

favor of Brewer.[2] Subsequently the 10th Circuit Court of Appeals affirmed.

I. ARGUMENT

Preface

This Court has on only one occasion considered Section 1970(a) (formerly §770(a)) of Title 38 of the United States Code (38 U.S.C. § 1965-1979), hereinafter referred to generally as SGLIA and that case was *Ridgway v. Ridgway*, 454 U.S. 46, 102 S.Ct. 49, 70 L.Ed.2d 39 (1981). In

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[2]Both Brewer and Zawrotny made claims upon two other insurance companies for payment of the proceeds under those policies. However, those claims were litigated in state court since they were clearly not affected by the SIGLIA. In two separate lawsuits, Oklahoma state courts determined that Zawrotny was entitled to the proceeds under 15 Okla.Stat. § 178, which generally disqualifies a named beneficiary from receiving life insurance proceeds upon the divorce of the insured and the named beneficiary. One of these cases is now on appeal to the Oklahoma Supreme Court.

Ridgway, the issue on appeal was stated at page 51 to be "whether an insured serviceman's beneficiary designation under a policy issued pursuant to the Serviceman's Group Life Insurance Act of 1965 (SGLIA), Pub. L. 89-214, 79 Stat. 880, prevails over a constructive trust imposed upon the policy proceeds by a state court decree" and answered that limited question by holding that it impermissibly interfered with SGLIA in two ways:

> 1. The state court's order requiring the serviceman to maintain his children as beneficiaries of the SGLIA policy on his life, if enforced, would ***prevent*** the serviceman from exercising his right under § 770(a), now § 1970(a), to designate as a beneficiary anyone or any legal entity the serviceman chose; and

2. The state court's decision allowing the imposition of a constructive trust on the insurance proceeds for the benefit of the serviceman's minor children, whose claim was based upon the state court's order requiring him to maintain them as beneficiaries on the SGLIA policy, would impermissibly conflict with § 770(g), now § 1970(g) which exempted the proceeds from the claims of creditors.

In addition, the Court at page 59 in considering the "equities" of the parties, found that the serviceman, although having obligations to his children, subsequently executed a change of beneficiary form removing his children as beneficiaries and naming his new wife, to whom he also had obligations, as his beneficiary. The Court concluded in footnote 12:

> Respondents in their brief and oral argument, speak of the "unjust" enrichment of Donna Ridgway. The suggestion is not persuasive, The record discloses no wrong on Donna's part. She was, after all, *the insured's*

> *wife at the time of his death*, and it is possible that depriving her of the proceed would be as inequitable as any other result, *** (emphasis added)

The Court went on to say at page 57: "We conclude, therefore, that the controlling provisions of the SGLIA prevail over and displace *inconsistent* state law." (emphasis added)

From this very limited decision sprang a multitude of decisions by inferior courts determining issues not raised in or decided by *Ridgway*. *See O'Neal v. Gonzalez*, 839 F.2d 1437 (11th Cir. 1988) (Congress intended to establish an inflexible rule that the beneficiary designated in accordance with the statute would receive the policy proceeds, regardless of other documents or the equities in a particular case.) *Prudential Ins. Co. of America v. Tull*, 690 F.2d 848 (4th Cir.

1982) (widow who was designated beneficiary on SGLIA policy and who murdered serviceman, could not recover policy proceeds); *Lanier v. Traub*, 934 F.2d 287 (11th Cir. 1991) (beneficiary designations under SGLIA are to be interpreted strictly to avoid placing undue administrative burden on private insurance carriers resulting from dispute concerning actual donative intent of insured serviceman); *Prudential Ins. Co. of America v. Neal*, 768 F.Supp. 195 (W.D. Tex. 1991) (primary beneficiary could not take SGLIA proceeds due to having killed insured and such proceeds would instead go to the contingent beneficiaries).

In addition, other courts, by analogy, have implanted the construction of various other federal acts to SGLIA. *See Metropolitan Life Insurance Company v.*

Hanslip, 939 F.2d 904 (10th Cir. 1991), *McMillan v. Parrott*, 913 F.2d 310 (6th Cir. 1990), and *Iron Workers Mid-South Pension Fund v. Stoll*, 771 F.Supp. 781 (E.D.La. 1991) (all involving ERISA policies); and *Metropolitan Life Ins. Co. v. Christ*, 979 F.2d 575 (7th Cir. 1992) involving FEGLIA policies). This, in spite of clear differences in the statutory language in SGLIA and the other federal acts. For example, the language in the Employee Retirement Insurance Security Act (ERISA), 29 U.S.C. 1001-1461 provides that "the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title," 29 U.S.C.

§1144(a). Likewise, the language in the Federal Employees Group Life Insurance Act (FEGLIA), 5 U.S.C. §§ 8701-16 provides that "the provisions of any contract under [FEGLIA] which relates to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any law of any State or political subdivision thereof, or any regulation issued thereunder, which relates to group life insurance to the extent that the law or regulation is inconsistent with the contractual provisions. 5 U.S.C. § 8709(d)(1).

Since SGLIA has none of the preceding provisions, the courts should not equate the different acts and construe them together by analogy.

Because of the confusion existing among the different jurisdictions, this

Court should grant certiorari and clear up the ambiguities existing which cause various jurisdictions to issue conflicting holdings.

15 OKLA. STAT. § 178 IS NOT DISPLACED BY OR IN CONTRADICTION OF ANY FEDERAL LAW.

Brewer relied upon 38 U.S.C. § 1770, which provides that the life insurance proceeds of a policy issued under the SGLIA shall be paid "First, to the beneficiary or beneficiaries as the member . . . may have designated. . . ." Brewer asserted that 15 Okla. Stat. § 178 "clearly interferes with the insured's right to designate the beneficiary pursuant to SGLIA." Plaintiff's Motion for Summary Judgment, Aplt. App. at 24. This, however, is simply not true, as a full reading of § 178 reveals.

Subsection A of § 178 provides that if, after an insured designates a spouse as a beneficiary, the insured and the spouse are divorced, "all provisions in such contract in favor of the decedent's former spouse are thereby revoked." Subsection B provides, however, that Subsection A shall *not* apply in certain circumstances. For example, if an insured does not like the automatic effect of § 178, he can easily avoid the effect by simply making his beneficiary designation contain a provision "expressing an intention contrary to subsection A of this section" (§ 178(B)(5)). Even if this has not been done, if the insured still wants the former spouse to be the beneficiary after the divorce, he can have the divorce court include in the divorce decree "a provision expressing an intention contrary to Sub-

section A" (§ 178(B)(2)) or rename the former spouse as a beneficiary (§ 178(B)(-6)).

Thus, it is clear that ***§ 178 does not interfere with the insured's right of designation of a beneficiary***. Rather, it merely recognizes that virtually no one would have any desire to benefit his/her ex-spouse with a large sum of life insurance proceeds, and that changing the beneficiary of a life insurance contract is often overlooked or not promptly attended to by the insured who is embroiled in the emotional issues of the divorce. Of course, as noted above, § 178 still allows for a different result for those rare occasions when the insured wants to do otherwise. Just as the legislature has patterned intestacy laws after typical desires of persons contemplating the de-

scent and distribution of their property, the legislature has patterned the law regarding life insurance beneficiaries of divorced persons after the typical desires of divorced persons.

The trial court and the Court of Appeals in the case at bar found the decision in *Ridgway* to be determinative of the issue before it, but failed to recognize the many dramatic and compelling differences between *Ridgway* and the instant case. These differences may be summarized as follows:

1. In *Ridgway*, the state law at issue was a trial court's order requiring the serviceman to maintain the minor children as beneficiaries of his SGLIA policy which, if enforced, would, ***completely prevent*** the serviceman from designating anyone he chose as a beneficiary; ***while in***

the case at bar the state law does not prevent him from naming anyone as beneficiary, ***it only requires that he memorialize his desire*** to retain or to make an ex-wife as a beneficiary at the time of, or after the divorce, in order that there will be documented proof that such was his desire;

2. In *Ridgway*, the children's claim was based upon a constructive trust imposed by the state on the proceeds of the SGLIA policy in violation of the exemption of the insurance proceeds from the claims of creditors provided for in 38 U.S.C. § 770(g) [now § 1970(g)]; ***while in the case at bar*** the claim of the deceased servicemen's estate is not based upon a creditor's claim, but upon the state law enacted to insure that if a divorced serviceman did not remove his ex-wife as

beneficiary of his life insurance policies, that this was a decision which he knowingly made and not the result of forgetfulness, error or any other unintentional act or omission to act;

3. In *Ridgeway*, the serviceman executed a change of beneficiary form ***after his divorce***, removing his children as beneficiaries of the SGLIA policy and naming his new wife thereby expressing in writing ***after the divorce*** his intent to have his new wife receive his insurance proceeds instead of his children; ***while in the case at bar*** the serviceman executed no written document, at the time of or after the divorce, expressing his intentions one way or the other--the very situation that the state law in question (15 O.S. § 178) was designed to cover;

4. In *Ridgeway*, the designated beneficiary was still the serviceman's wife at the time of his death; ***while in the case at bar***, Paula Brewer was only an ex-wife and one who had been married to the serviceman ***only twenty days*** when she filed an action to divorce him and who was not the serviceman's wife at the time of his death;

5. In *Ridgeway*, the upholding of the state law at issue (the trial judge's order to maintain the children as beneficiaries) would be in direct conflict and would nullify one of the main purposes of the federal act (SGLIA)--to insure that the serviceman could designate anyone or anything as his beneficiary; ***while in the case at bar***, the state law (15 O.S. § 178) is not in conflict with and will not nullify the federal act, but rather will

assist in insuring that the insurance proceeds actually go to the ones that the serviceman intended.

6. In *Ridgeway*, the deceased serviceman had a legal obligation to the designated beneficiary as she remained his wife until his death; ***while in the case at bar***, Paula Brewer was the deceased serviceman's wife at the time the designation was signed but had already filed for divorce at the time the beneficiary designation was received by the insurer and had been divorced from him for 23 days at the time of his death. The deceased had no obligation to Paula Brewer at the time of his death.

This Court held in *Ridgway* that the imposition of the trust was an impermissible overriding of the serviceman's right to choose his/her own beneficiary. *Id.*,

454 U.S. at 60, 102 S.Ct. at 57. In coming to this conclusion, the Court repeatedly emphasized as the basis for the *Ridgway* decision the serviceman's right to name the beneficiary of his choice:

> "[T]he insured had the right to designate and to change the beneficiary." 454 U.S. at 55, 102 S.Ct. at 55.
>
> "[T]he insured service member possesses the right to freely designate the beneficiary and to alter that choice at any time by communicating the decision in writing to the proper office." 454 U.S. at 55-56, 102 S.Ct. at 55.
>
> "There can be no doubt that Congress was aware of the breadth of the freedom of choice accorded the service member under the SGLIA. The pertinent House Report stated flatly: 'The serviceman may designate any person as a beneficiary.'" 454 U.S. at 56, 102 S.Ct. at 55.
>
> "Federal law and federal regulations bestow upon the service member an absolute right to designate the policy beneficiary. The right is personal to the member alone. It is not a

> shared asset subject to the interests of another, as is community property." 454 U.S. at 59-60, 102 S.Ct. at 57.

15 Okla. Stat. § 178 did *not* prohibit Carrol C. Ballard from continuing Brewer as the intended beneficiary; it merely required him to take an ***affirmative act*** to establish that he still desired her to be the beneficiary, even though she was no longer his wife, and that the failure to affirmatively change the beneficiary was not a mere oversight on his part, if such was the case.

The Court also made it clear that the named beneficiary is *not always* the one who may be entitled to receive the life insurance proceeds. For example, the Court recognized that the *Ridgway* decision may not apply to cases where the named beneficiary murdered the insured. *Ridgway*, 454 U.S. 60, 102 S.Ct. at 57

(footnote 9), citing *Shoemaker v. Shoemaker*, 263 F.2d 931 (6th Cir. 1959) ("the equitable principle that no person should be permitted to profit from his own wrong intervenes to prevent such a beneficiary from taking the proceeds of the insurance"). This could be true even though the SGLIA's blanket proclamation (that the named beneficiary shall receive the proceeds) contains no exception for such situations.

This Court also said that *Ridgway* did not address "the legal aspects of extreme fact situations or of instances where the beneficiary has obtained the proceeds through fraudulent or illegal means. . . ." *Ridgway* at footnote 9. By making this qualification, this Court has clearly allowed for the consideration of equitable principles which do not inter-

fere with the insured's freedom to pick his own beneficiary.

The case at bar certainly falls within the clear exception of "extreme fact situations" which militate against blind adherence to the literal terms of the federal act:

1. Brewer filed for divorce just *twenty days* after she and Ballard were married.

2. If Brewer prevails in this case, she will receive over $50,000[3] as a result of her *twenty-day* marriage to Ballard, free and clear of any claims whatsoever, to the exclusion of the children and creditors of Ballard.

3. If Zawrotny prevails in this case, the insurance proceeds will become property of the estate of Ballard, whose devisees and legatees are the natural

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[3]In addition, as was noted *supra*, p. 1, Brewer and Zawrotny are involved in a state court appeal over proceeds of insurance not governed by any federal law; the only question in that appeal is the applicability of 15 Okla. Stat. § 178.

> object of his bounty: his children by his first marriage.

In the ***sixteen days*** between his divorce and his death, Ballard took no action to change the beneficiary. Ballard's inaction could have been conscious inaction (*i.e.*, he consciously pondered changing the beneficiary after his divorce, but decided that he did not need to do so because, by virtue of 15 Okla. Stat. § 178, his ex-spouse (Brewer) would automatically be disqualified from receiving the proceeds from the life insurance[4]). Therefore, refusing to apply § 178 would produce a result contrary to the intentions of the insured, and contrary to the language and spirit of *Ridgway* and § 178.

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[4]Everyone is presumed to know the law. See *supra*, footnote. In this case, therefore, this Court must assume that Ballard was aware of 15 Okla.Stat. § 178.

The other possibility is that Ballard's inaction was *not* conscious (*i.e.*, he never consciously pondered changing the beneficiary after his divorce). Perhaps he did not think about the life insurance at all during the short time between his divorce and his death. This would certainly be understandable given the fact that he lived only *sixteen days* after his divorce.[5] If, in fact, Ballard did *not* ponder this point, it is not difficult to come to a reasonably safe conclusion, based upon human nature, as to

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[5]During this time, no payment was made or was due (see Exhibit C of defendant Zawrotny's Combined Counter-Motion for Summary Judgment and Brief in Support Thereof and Brief in Opposition to Plaintiff's Motion for Summary Judgment, which shows that the last payment was received 11/05/90 (before the divorce), and the next payment was due on 12/01/90 (after Carrol Ballard's death)), so there is no evidence that the subject of life insurance was ever brought to his attention after the divorce.

what he would have wanted; as the Oklahoma legislature recognized in enacting § 178, insureds generally do not want to benefit their ex-spouses to the exclusion of their present spouses, children and other loved ones, and there is no reason to believe Ballard would have wanted a woman to whom he was married only ***twenty days*** before the divorce was filed to have over $50,000 while his children and legitimate creditors receive nothing.

As further evidence of the purposes of the SGLIA, Zawrotny presented to the district court excerpts from the Servicemen's & Veterans' Group Life Insurance Handbook, September, 1987, supervised by the Administrator of Veteran Affairs, Department of Veteran Benefits. That publication states that "This handbook has been prepared to assist the personnel of

the uniformed services, the VA in counseling service personnel, and veterans as to the insurance available to them under the Servicemen's and Veterans' Group Life Insurance programs." Chapter 5 of the handbook covers beneficiaries, and the pertinent parts thereof are as follows:

CHAPTER 5. BENEFICIARIES

5.01 DESIGNATION OF BENEFICIARY(IES)--GENERAL

An insured member under SGLI may designate as principal beneficiary or contingent beneficiary any person, firm, corporation or legal entity (including the insured's estate), individually or as a trustee.

5.02 BENEFICIARY(IES) NOT DESIGNATED

If a member does not designate a beneficiary, the insurance will automatically be paid in the following *order of precedence:*

a. The surviving spouse of the member; if none, it is payable to

b. The child or children of the member, in equal shares, with the share of any deceased child to be distributed among

the descedants (sic) of that child; if none, it is payable to

c. The parents in equal shares or all to the surviving parent; if not, it is payable to

d. A duly appointed executor or administrator of the insured's estate; if not, it is payable to

e. Other next of kin

5.03 DESIGNATIONS REQUIRING OFFICIAL COUNSELING

a. While the law provides through the *order of precedence* a convenient order for the payment of the proceeds, there are many instances when the member should clearly designate specific beneficiary(ies) such as:

(1) When a member has a parent who has remarried but both natural parents are living; or

(2) When a member is divorced and remarried, but has children living with the first spouse; or

(3) When a member has no immediate next of kin and wants a distant relative or friend to receive the proceeds.

b. When a member is likely to be survived by dependents or parents and designates some other person or entity as beneficiary, a responsible representative of the uniformed service should counsel

the member to the fact that the Servicemen's Group Life Insurance Act was specifically designed to provide some form of security for dependents or parents. The member should be encouraged to designate such dependents or parents as beneficiaries. If the unusual designation is to be continued, a memorandum indicating that this was discussed with the member should be placed in the member's personnel file as a matter of record.

c. Under no circumstances should a member be compelled to designate any beneficiary other than one of his or her own choosing. The selection of a beneficiary is a matter of free election for the insured, and the insured should never be forced to designate otherwise. However, when dependents or parents are disregarded in designating beneficiaries, it is desirable that the voluntary nature of the designation should be a matter of record.

d. In any event, whenever there is any question or doubt as to a beneficiary, the uniformed service should encourage the member to complete SGL V 8286, Servicemen's Group Life Insurance Election, in order to clearly identify the person(s) to whom the proceeds of the group insurance should be paid.

In short, Section 5.01 lets the insured member know that he/she may designate anyone or any legal entity as the benefi-

ciary, while Section 5.02 sets forth the order of precedence of the natural objects of the insured's bounty. It also informs the insured member who the beneficiary/beneficiaries will be if none is designated. Note that if no beneficiary is selected by an insured member who is single (*i.e.*, divorced, widowed or never married), the children of the member will be deemed the sole and equal beneficiaries of the policy.

Section 5.03a recognizes that there may be rare occasions when a member may desire to name a specific beneficiary not in the normal order of precedence. Subsection b recognizes that "the Servicemen's Group Life Insurance Act was specifically designed to provide some form of security for dependents or parents"; that "the member should be encouraged to desig-

nate such dependents or parents as beneficiaries" (the natural objects of his bounty); and that if the member insists upon the "unusual designation," "a memorandum indicating that this was discussed with the member should be placed in the member's personnel file as a matter of record."

Subsection c of Section 5.03 reiterates that the member should not be compelled under any circumstances to designate anyone other than the one of the member's own choosing, but when dependents or parents are disregarded in designating beneficiaries, ***the <u>voluntary</u> nature of the designation should be a matter of record.***

Subsection d is a catch-all provision which suggests that when there is any doubt as to a beneficiary, the uniformed service should encourage the member to

complete a Servicemen's Group Life Insurance Election form in order to clearly identify the person(s) to whom the proceeds of group insurance should be paid.

All of the above recognize that, since the purpose of the Act providing for the insurance coverage was to protect the dependents and parents of the service member (and not an ex-wife of short duration) and that, since such protection of the dependents and parent should be encouraged, great care and positive actions are called for to insure that, if the member elects to have the insurance proceeds to go to someone other than the natural objects of his/her bounty (*i.e.*, if the member elects an "unusual designation"), such election is made intelligently and voluntarily.

There can be no question but that if Ballard had voluntarily attempted to name as beneficiary of his life insurance policy an ex-wife who had filed for divorce only *twenty days* after the marriage, and divorced him only 39 days after the marriage, instead of his five children and widowed mother, Section 5.03 would require (1) counseling with this member by a responsible representative of the uniformed service to let him know that the Act was specifically designed to provide some sort of security for his dependents or parent and to encourage him to designate his dependents and parent as beneficiaries instead; and (2) if such encouragement was unsuccessful, the placing of a memorandum in the member's personnel file indicating that this was discussed with the member and that he desired the "unusual designa-

tion" to continue and that the "unusual designation" was intelligently and voluntarily made.

However, the Handbook covers only the situation whereby the service member attempts to *initially* designate some one other than the natural objects of his/her bounty as the beneficiary. Obviously, a spouse is considered to be the first object of the member's bounty, so when Ballard designated his wife at that time, none of the safeguards set forth in the Handbook was triggered.

The Handbook does *not* cover the situation where a service member is divorced by his/her spouse *after* her having been designated during the marriage as the primary beneficiary of the member's life insurance policy. Even though it goes to such lengths to encourage and counsel the

insured not to initially make an "unusual designation" of a beneficiary, it does nothing to call the fact to the insured's attention, that *upon divorce, what had been a usual designation of a spouse as the primary beneficiary now becomes an "unusual designation" of an ex-spouse.*

15 Okla. Stat. § 178 addresses this anomaly and attempts to rectify it by acknowledging the incontrovertible fact that the continued designation of an ex-wife as a beneficiary for the member's life insurance policy creates an "unusual designation" of his beneficiary. It does *not* prevent the insured from continuing the designation of the now-ex-spouse as a beneficiary; rather, it seeks to insure that if the insured does so, it was the result of an intentional act rather than an unintentional omission to act. It

requires that the insured pursue one or more of several alternatives, to document that the "unusual designation" of a beneficiary is the one which has been voluntarily and intentionally chosen, just as the Handbook requires for an initial unusual designation.

The Handbook makes clear that the purpose of the Act was specifically to provide some form of security to the natural objects of the member's bounty, to encourage the member to designate such persons as beneficiaries, and, if the member chooses to do otherwise, to insure that the member has made an intentional and informed choice to do so. How can all of those objects be so easily cast aside if the member forgets or neglects to change the beneficiary after a divorce? Reason and justice ***demand*** that the objects

of the Act prevail over some mere technicality.

It is important to note that if *Ridgway* had been an Oklahoma case, subject to 15 O.S. § 178, the decision by this Court would remain the same, as Sgt. Ridgway executed a change of beneficiary after the divorce, rather than dying divorced without having executed a change of beneficiary, as is the situation in the case at bar. Therefore, *Ridgway* is not only not dispositive of the case at bar, but is fully compatible with the position put forth by Zawrotny.

CONCLUSION

In *Ridgway, supra*, the state action which was condemned was a state court's order ***requiring*** the service member to maintain his children as sole beneficiaries of his government insurance policy,

thereby *preventing* the service member from choosing the beneficiary. The insured, in violation of the state court order, changed his beneficiary to his new wife, and this Court held that the state court's restriction conflicted with the SGLIA's mandate of freedom of choice for the insured to designate beneficiaries. In the case at bar, 15 Okla. Stat. § 178 does not and did not interfere with the insured's right to freely designate anyone of his choosing as beneficiary; rather, it merely requires certain steps to insure that such decision was made intentionally and voluntarily—entirely in keeping with the safeguards envisioned in the Handbook when an initial designation of a beneficiary is made.

When the purposes of the SGLIA are considered along with the purposes of 15

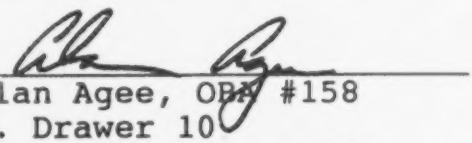
Okla. Stat. § 178, it becomes apparent that rather than being in conflict, they both seek the same result. Neither prohibits the service member from naming anyone or any entity as the beneficiary of his or her life insurance policy. They both seek to insure that, if the insured chooses for his life insurance proceeds to go to one not the natural object of his/her bounty, such choice was voluntarily and intelligently made, and not just the result of inadvertence or oversight. The Oklahoma statute, therefore, is not in contradiction of, but instead is ***totally compatible*** with the SGLIA, and the two should be considered *in pari materia*, and effect should be given to both.

Of course, it might be tempting to say that, while the state statute is admittedly not contradictory with the ob-

jects of the federal statute and in fact, is the ideal complement to it *regarding* the specific facts of this case, it still remains that it is not actually part of the federal statute and, therefore, is superseded by federal law. This argument, however, places the importance of the bare technicality of whose name appears on the last beneficiary designation over the spirit, substance and obvious intent of both the federal statute itself and the official Handbook establishing practices to be conducted in connection with administration of the insurance. This ultra-technical approach is *not* required, as is clearly evidenced by the admission of this Court in *Ridgway* that extreme circumstances may require employment of equitable principles which would require an abandonment of a purely technical approach.

For these reasons, summary judgment in favor of Brewer was clearly improper and therefore certiorari should be granted by this Court.

GARVIN, AGEE & CARLTON

By 

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APPENDIX

Western District of Oklahoma

Memorandum Opinion and Order

Judgment

Tenth Circuit Court of Appeals

Opinion

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

PAULA RAYE BREWER, Plaintiff vs. CAROL ELIZABETH ZAWROTNY, as personal representative of the estate of Carrol Clint Ballard, Deceased, Defendant	)	No.CIV-91-0407-C

FILED
OCT 31 1991
ROBERT D. DENNIS, CLERK
U.S. DIST. COURT, WESTERN DIST. OF OKLA.
BY _____, DEPUTY

MEMORANDUM OPINION AND ORDER

This matter is before the Court for consideration of two motions. By way of a motion for summary judgment, plaintiff, Paula Raye Brewer ("Brewer"), requests a determination that as a matter of law she is entitled to the proceeds of an insurance policy. By way of a motion to stay and/or certify the question to the Oklaho-

ma Supreme Court, defendant, Carol Elizabeth Zawrotny, as personal representative of the estate of Carrol Clint Ballard, Deceased, ("Zawrotny"), requests this Court either stay its decision on the dispositive motion until related state court proceedings are completed, or to certify the questions relating to the interpretation of Oklahoma law to the Oklahoma Supreme Court. As a preliminary matter, the following facts are pertinent to these issues. Unless otherwise noted, references are to the section labeled Statement of Material Facts (As To Which Movant Contends No Genuine Issue Exists) which appears in Brewer's motion for summary judgment. For the purpose of resolution of this motion, Zawrotny has admitted

the statements set forth by Brewer and has submitted additional facts.

1. Effective March 31, 1979, the life of Carrol C. Ballard ("Ballard") was insured under a policy issued by the Prudential Insurance Company of America ("Prudential") through Prudential's Office of Servicemen's Group Life Insurance. (¶1)

2. Beginning in approximately January, 1989, Brewer dated and cohabited with Ballard. (Affidavit of Brewer, ¶2)

3. On September 29, 1990, Brewer married Ballard. (Affidavit of Brewer, ¶2)

4. On October 12, 1990, Ballard completed a Beneficiary Designation form for his Prudential insurance policy in which he designated Brewer as the benefi-

ciary. (¶4; and ¶3 of Zawrotny's additional facts as contained in her response to Brewer's motion for summary judgment)

5. On October 19, 1990, Brewer filed an action to divorce Ballard. (¶4 of Zawrotny's additional facts as contained in her response to Brewer's motion for summary judgment)

6. On October 19, 1990, Prudential recorded Ballard's Beneficiary Designation which named Brewer as the principle beneficiary. (¶¶4 and 5)

7. On November 7, 1990, Brewer and Ballard were divorced. (¶6)

8. On November 23, 1990, Ballard died. (¶7)

In her complaint, Brewer premised jurisdiction on the allegation that this action arose under the National Service

Life Insurance Act (the "Act"), 38 U.S.C. § 701, *et seq.*, and Article VI, Clause 2, of the United States Constitution. The federal question asserted was whether the beneficiary provisions of that Act prevail over Oklahoma law. In her answer, Zawrotny has admitted these allegations.

Brewer argues the Act, as a federal law, controls the outcome of this controversy, i.e., notwithstanding the application of Okla. Stat. tit. 15, § 178, the Supremacy Clause of the United States Constitution mandates the resolution of this case must be in accordance with federal law, citing *Ridgway v. Ridgway*, 454 U.S. 36 (1981).

Section 178 of Title 15 concerns situations where there is a written contract for the payment of death benefits.

If the party who has the power to designate the beneficiary divorces the beneficiary and then dies, all provisions in the contract in favor of the decedent's former spouse are revoked. However, these provisions are inapplicable to many situations, including one in which "any contract of a decedent [was] made and entered into on or after November 1, 1987." Okla. Stat. tit. 15, § 178(d). The application of Oklahoma law is urged by Zawrotny by which she asserts defendant would prevail. Brewer responds that even if state law applies, subsection D precludes Zawrotny's recovery because the insurance contract dates from 1979 and the statute is only applicable to contracts after November, 1987.

Zawrotny argues because there is no clear case law in Oklahoma interpreting

Okla. Stat. tit. 15, § 178, this Court should refuse to decide these issues until the Oklahoma Supreme Court responds to a certified question, citing Okla. Stat. tit. 20, § 1602.

This Court, having examined the pleadings on file and the arguments of counsel, finds that certification of a question to the Oklahoma Supreme Court is unnecessary as an answer from the Oklahoma Supreme Court would not be determinative of the cause now pending. Therefore, Zawrotny's request for certification and stay is denied.

Turning to the issues raised in the motion for summary judgment, the Court finds the ruling and discussion found in *Ridgway* to be determinative of the issues here.

In *Ridgway*, it was noted that even in the area of domestic relations the Supreme Court "has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in the federal rights." *Id*, at 54 (citations omitted). For the reasons explained in that opinion, the Supreme Court concluded that "the controlling provisions of the SGLIA [Servicemen's Group Life Insurance Act] prevail over and displace inconsistent state law." Id, at 57. See also *Prudential Insurance Co. v. King*, 453 F.2d 925 (8th Cir. 1971). This federal law provides that the insurance in force on the date of a former service member's death shall be paid to

"the beneficiary or beneficiaries as the member or former member may have designated by a writing received prior to death." 38 U.S.C. § 770(a).

In the case at bar, there is no dispute that Ballard was insured under a SGLI [sic] policy. There is no dispute that prior to Ballard's death he executed and delivered a Beneficiary Designation in which he named Brewer as the principal beneficiary. Applying the order of payment explained in the Act, Brewer would receive the benefits of Ballard's SGLI [sic] policy. To accept the argument of Zawrotny would be in clear disagreement with this federal law. Even assuming Ballard's designation of Brewer could be considered a new contract, this would still fun [sic] afoul of the clearly an-

nounced provisions of the Act. For these reasons, Brewer's motion for summary judgment will be granted, and Zawrotny's motion for summary judgment will be denied.

IT IS THEREFORE ORDERED, for the reasons explained above, Zawrotny's motion to certify or stay is hereby DENIED; Zawrotny's motion for summary judgment is hereby DENIED; and Brewer's motion for summary judgment is hereby GRANTED. A judgment shall enter accordingly.

IT IS SO ORDERED this 31 day of October, 1991.

s/ Robin J. Cauthron
ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

PAULA RAYE BREWER,

Plaintiff

vs.

CAROL ELIZABETH ZAWROTNY, as personal representative of the estate of Carrol Clint Ballard, Deceased,

Defendant

No.CIV-91-0407-C

FILED
OCT 31 1991
ROBERT D. DENNIS, CLERK
U.S. DIST. COURT WESTERN DIST. OF OKLA
BY _____, DEPUTY

J U D G M E N T

Upon consideration of the pleadings herein, the Court finds that defendant's motion for summary judgment should be denied and plaintiff's motion for summary judgment should be granted. Judgment is therefore entered on behalf of plaintiff.

DATED this 31 day of October, 1991.

s/ Robin J. Cauthron

ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET ON 10-31-91

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

PAULA RAYE BREWER,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 91-6383
	)	
CAROL ELIZABETH ZAWROTNY, Personal Representative of the Estate of Carrol Clint Ballard, Deceased,	)	
	)	
Defendant-Appellant.	)	

FILED
United States Court of Appeals
Tenth Circuit
NOV 5 1992
ROBERT L. HOECKER
Clerk

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CIV-91-407-C)

Submitted on the briefs:

B.J. Brockett, Anthony L. Jackson, and J. Mark Spaeth, of Brockett, Jackson & Spaeth, P.C., Oklahoma City, Oklahoma, for Plaintiff-Appellee.

Alan Agee, Brett Agee, James W. Carlton, Jr., of Garvin, Agee & Carlton, Pauls Valley, Oklahoma, for Defendant-Appellant.

Before SEYMOUR, ANDERSON, and BALDOCK, Circuit Judges.

BALDOCK, Circuit Judge.

Defendant-appellant Carol Elizabeth Zawrotny, as personal representative of the estate of Carrol Clint Ballard, appeals the district court's ruling entitling plaintiff-appellee Paula Raye Brewer to the proceeds of a life insurance policy on Ballard's life. The essential facts in this case are undisputed. Ballard, a

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

BEST AVAILA

retired Air Force officer, held a life insurance policy issued by Prudential Insurance Company pursuant to the Servicemen's Group Life Insurance Act, 38 U.S.C. §§ 1965-1979 (SGLIA). After their marriage, Ballard designated Brewer as the beneficiary of the policy proceeds. The marriage was short-lived, and Ballard died sixteen days after their divorce was final. At no time after the divorce or before his death did Ballard attempt to change the beneficiary designation.

The conflict in this case arises between the application of federal law, the SGLIA, and state law, namely Okla. Stat. Ann. tit. 15, § 178 (West 1966 & Supp. 1992). The SGLIA provides that proceeds of a policy issued pursuant to the SGLIA shall be paid "to the benefi-

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ciary or beneficiaries as the member ... may have designated by a writing received prior to death ...." 38 U.S.C. § 1970(a). Application of the SGLIA would entitle Brewer, as the last designated beneficiary, to the proceeds of Ballard's life insurance policy. We also note that, in the absence of a designated beneficiary, the SGLIA provides an ordered listing of persons to whom the proceeds are to be paid. Oklahoma law provides that, should an insured die after divorcing the named beneficiary under a life insurance policy, "all provisions in such contract in favor of the decedent's former spouse are thereby revoked." Okla. Stat. Ann. tit. 15, § 178 A. Application of Oklahoma law would invalidate Ballard's designation of Brewer as beneficiary and, under the listed pro-

visions of the SGLIA, the proceeds of Ballard's life insurance policy would be paid to Zawrotny, as the administrator of Ballard's estate.

On cross-motions for summary judgment, the district court ruled that the SGLIA preempts application of the Oklahoma statute, relying on *Ridgway v. Ridgway*, 454 U.S. 46 (1981). The court granted summary judgment to Brewer.[1] Our juris-

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[1] Zawrotny also moved for certification to the Oklahoma Supreme Court or for the district court to stay its decision pending resolution of a state action on a separate, non-SGLIA, life insurance policy held by Ballard. The district court denied these motions. While Zawrotny's brief states that "this Court could accept the state trial court's decision or adopt the Oklahoma Supreme Court's interpretation once it is rendered," Appellant's Brief at 5, she does not challenge the district court's denial of these motions on appeal or request certification before this court. See *Nunez-Pena v. INS*, 956 F.2d 223, 225 n.4 (10th Cir. 1992) (litigant who mentions point in passing

diction over this appeal arises from 28 U.S.C. § 1291. We review the district court's grant of summary judgment de novo, applying the same legal standards used by that court. *Applied Genetics Int'l Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). Where there are no genuine issues of material fact, as in this case, we must determine whether, viewing the record in a light favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Deepwater Invs., Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1110 (10th Cir. 1991).

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without argument or authority in support forfeits the point).

Zawrotny challenges the district court's ruling that the SGLIA preempts application of the Oklahoma statute, arguing 1) the SGLIA does not conflict with Oklahoma law, because the state statute allows an insured to override the revocation by expressing an intention to retain a former spouse as the designated beneficiary, 2) *Ridgway* is distinguishable and, therefore, not dispositive, 3) this case involves an "extreme fact situation" constituting equitable justification to depart from application of the SGLIA provisions, and 4) the underlying purpose of the SGLIA, to provide security for dependents or parents of the insured, would not be served by its application in this case to the exclusion of the Oklahoma statute.

> Even where Congress has not completely displaced state [law] in

> a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state [law] is a physical impossibility,' *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982). While various theories can be propounded to harmonize the Oklahoma statute with the SGLIA provisions and legislative history in this case, Zawrotny's narrow analysis and her attempts to distinguish *Ridgway* on its facts miss the mark. Application of Oklahoma law would result in the proceeds going to Ballard's estate; application of federal law would result in the proceeds

going to Brewer. Accordingly, the two statutes are in conflict, and federal law preempts application of the Oklahoma statute.

We are not alone in construing the SGLIA strictly to preempt application of a state law which would result in the distribution of insurance proceeds to persons other than those designated by the insured.[2] See e.g., *Ridgway*, 454 U.S. at 53-57, 60 ("the controlling provisions of

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[2] Several of these cases deal with insurance issued pursuant to the Federal Employees' Group Life Insurance Act (FEGLIA). Because the language of the FEGLIA and the SGLIA are very similar, cases construing each of these statutes are often used in examining the other. See e.g., *Metropolitan Life Ins. Co. v. McMorris ex rel. McMorris*, 786 F.2d 379, 380 (10th Cir. 1986)(*Ridgway* dispositive of claim involving a FEGLIA policy); *Mercier v. Mercier*, 721 F. Supp. 1124, 1126 (D.N.D. 1989)(discussing several cases under both the FEGLIA and SGLIA).

the SGLIA prevail over and displace inconsistent state law"); *O'Neal v. Gonzalez*, 839 F.2d 1437, 1440 (11th Cir. 1988) ("Congress intended to establish ... an inflexible rule that the beneficiary designated in accordance with the statute would receive the policy proceeds, regardless of other documents or the equities in a particular case."); *Stribing v. United States*, 419 F.2d 1350, 1354 (8th Cir. 1969) ("Congress intended the beneficiary designation provisions of [the FEGLIA] to be strictly construed. By analogy, we implant that same construction upon [the SGLIA]."); *Prudential Ins. Co. of Am. v. Neal*, 768 F. Supp. 195, 197-98 (W.D. Tex. 1991) ("distribution of the proceeds of [the SGLIA policy] is governed by federal law"); *Mercier v. Mercier*, 721 F. Supp.

1124, 1126 (D.N.D. 1989) ("Congress appears to have intended that the beneficiary properly designated by the insured, in writing and received by the employing office, was to take precedence over any other potential beneficiary, regardless of whether the nondesignated individual might have a valid claim under state law."); cf. *Ward v. Stratton*, 795 F. Supp. 289, 292-93, (E.D. Mo. 1992) (insured's written instructions changing his beneficiary designation satisfied SGLIA requirements, even though final form received after insured's death).

In light of the facts contained in these cases, we disagree with Zawrotny that this case is an "extreme fact situa-

tion," demanding an exception to strict application of the SGLIA provisions.[3]

See *O'Neal*, 839 F.2d at 1440 ("while the result may be harsh, the language and intent of the statute are clear"), cf. *Prudential*, 768 F. Supp. at 198 (named beneficiary barred from recovering SGLIA policy proceeds where she killed insured). Similarly, based on these authorities, we conclude that the purposes of the SGLIA are best served by strict compliance with the provisions enacted by Congress. See *Ridgway*, 454 U.S. at 63; *O'Neal*, 839 F.2d at 1440.

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[3] The bases for this argument appear to be the short time spans between Ballard's marriage to Brewer, their divorce and his death, and Zawrotny's unsupported allegations that Ballard would not have intended Brewer to have the proceeds of the SGLIA policy following their divorce. Appellant's Brief at 11-12.

The judgment of the United States District Court for the Western District of Oklahoma is AFFIRMED.